

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of November, two thousand twelve.

PRESENT: JOHN M. WALKER,
RICHARD C. WESLEY,
PETER W. HALL,
Circuit Judges.

2006 Frank Calandra, Jr. Irrevocable Trust, Karl Anthony Calandra, as Trustee of 2006 Frank Calandra, Jr. Irrevocable Trust, Kara Marie Calandra Charbonneau, as Trustee of 2006 Frank Calandra, Jr. Irrevocable Trust, Kristin Hassoun, as Trustee of 2006 Frank Calandra, Jr. Irrevocable Trust,

Plaintiffs-Counter Defendants-Appellants,

v.

11-4090

Signature Bank Corporation,

Defendant-Counter-Claimant-Appellee,

Cushner & Garvey, LLP, Signature Bank, AKA Signature Bank Corp.,

Defendants.

FOR APPELLANTS: ROY A. POWELL (Leon F. DeJulius, Jr., on the brief), Jones Day, Pittsburgh, PA.

1 FOR APPELLEE: ROBERT M. ROSENBLITH, Chestnut Ridge, NY.

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3 Appeal from the United States District Court for the
4 Southern District of New York (Daniels, J.).

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6 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
7 **AND DECREED** that the judgment of the United States District
8 Court for the Southern District of New York is **AFFIRMED**.

9 The 2006 Frank Calandra, Jr. Irrevocable Trust (the
10 "Trust") and its Trustees Kristin Hassoun, Kara Calandra
11 Charbonneau, and Karl Calandra (collectively, the
12 "Plaintiffs") appeal from an August 31, 2011 order of the
13 United States District Court for the Southern District of
14 New York (Daniels, J.), granting summary judgment for the
15 Defendant-Appellee Signature Bank Corp. ("Signature Bank")
16 and denying Plaintiffs' motion for partial summary judgment.
17 *2006 Frank Calandra, Jr. Irrevocable Trust v. Signature Bank*
18 *Corp.*, 816 F. Supp. 2d 222 (S.D.N.Y. 2011). In the
19 underlying suit, Plaintiffs allege that Signature Bank was
20 liable under New York common law and the New York Uniform
21 Commercial Code ("NY UCC") for the depletion of Trust funds
22 by former Trustee Edward Stein. The panel has reviewed the
23 briefs and the record in this appeal and agrees unanimously
24 that oral argument is unnecessary because "the facts and
25 legal arguments [have been] adequately presented in the

1 briefs and record, and the decisional process would not be
2 significantly aided by oral argument." Fed. R. App. P.
3 34(a)(2)(C). We assume the parties' familiarity with the
4 underlying facts, the procedural history, and issues on
5 appeal.

6 Plaintiffs contend that the district court erred in
7 analyzing its various negligence and gross negligence
8 claims. We disagree. Plaintiffs contend that the district
9 court erred by failing to address their claim that Signature
10 Bank negligently accepted and established the Trust Account.
11 This claim is not apparent from the face of the complaint,
12 which focuses on Signature Bank's alleged failure "to make
13 any reasonable inquiries or to safeguard the trust funds
14 **after** Stein's large transactions." J.A. 21, Compl. ¶ 12.
15 (emphasis added). Indeed, under the claims for relief, the
16 complaint describes the negligence/gross negligence claim as
17 follows: "Signature Bank breached its duty to the Calandra
18 Trust . . . by refusing to make reasonable inquiries or
19 safeguard Trust funds in the face of clear evidence that
20 Stein was misappropriating Trust funds." J.A. 22-23, Compl.
21 ¶ 19. Claims not adequately raised below are generally
22 deemed waived on appeal. See *Allianz Ins. Co. v. Lerner*,
23 416 F.3d 109, 114 (2d Cir. 2005).

1 Nevertheless, as a matter of law, Signature Bank did
2 not act negligently in setting up the Trust Account. In
3 this vein, Plaintiffs argue that Signature Bank should have
4 had "a dedicated trust department" with special policies and
5 procedures to ensure that employees "understood the purpose
6 of the Trust, the responsibilities of the Trustees, the
7 safeguarding of trust assets and the contents of the
8 underlying Trust Agreement." While this argument might make
9 sense when a bank undertakes to manage a trust, it is far
10 less persuasive where, as here, the bank was only asked to
11 open a typical bank account for the Trust. Accepting
12 Plaintiffs' view would impose on every banking institution
13 the duty to have a dedicated trust department in order to do
14 any business with trusts. New York courts will not, "as a
15 matter of policy," create a duty of care that essentially
16 makes banks trustees of every trust with which they do
17 business. *Lauer v. City of New York*, 95 N.Y.2d 95, 100
18 (2000).

19 The district court also did not err in concluding that
20 Signature Bank was not grossly negligent in monitoring the
21 Trust Account. It is well settled that "a depository bank
22 has no duty to monitor fiduciary accounts maintained at its
23 branches in order to safeguard funds in those accounts from

1 fiduciary misappropriation." *Lerner v. Fleet Bank, N.A.*,
2 459 F.3d 273, 287 (2d Cir. 2006) (citing *Norwest Mortgage,*
3 *Inc. v. Dimes Sav. Bank of N.Y.*, 2 A.D.2d 653, 654 (2d Dep't
4 2001) (internal quotation marks omitted)). "The bank has
5 the right to presume that the fiduciary will apply the funds
6 to their proper purposes under the trust." *Id.* (quoting
7 *Bischoff ex rel. Schneider v. Yorkville Bank*, 218 N.Y. 106,
8 111 (1916) (internal quotation marks omitted)). It was up
9 to the Trustees, not Signature Bank, to make sure that Trust
10 funds were being used appropriately.

11 It is true, as Plaintiffs point out, that a bank has a
12 duty to make reasonable inquiries to prevent fraud where it
13 has "notice or knowledge that a diversion is intended or
14 being executed." *Id.* at 287 (quoting *In re Knox*, 64 N.Y.2d
15 434, 438 (1985) (internal quotation marks omitted)). But
16 here, Signature Bank had every reason to believe that the
17 transactions were valid and authorized by the Trust. At the
18 time of the transactions, Signature Bank had two documents
19 governing the Trust Account that were signed by all three
20 Trustees. The Trust Account Application reflected that each
21 Trustee had signing authority and could act individually
22 with respect to the account. The Funds Transfer Agreement
23 ("FTA") further authorized each of the Trustees to remove

1 funds from the account individually. Given this
2 documentation, Signature Bank did not act negligently in
3 processing the transactions, each of which was signed by a
4 Trustee and was consistent with the aforementioned
5 agreements.

6 Plaintiffs also contend that the district court erred
7 in focusing solely on their gross negligence claim without
8 separately addressing their negligence claim. Both claims
9 require a showing that the defendant breached a duty of care
10 owed to the plaintiff. *Solomon ex rel. Solomon v. City of*
11 *New York*, 66 N.Y.2d 1026, 1027 (1985) (Mem.). The only
12 difference between the two claims is that gross negligence
13 requires an additional showing that the defendant's conduct
14 "evinces a reckless disregard for the rights of others or
15 'smacks' of intentional wrongdoing." *Colnaghi, U.S.A., Ltd.*
16 *v. Jewelers Prot. Servs., Ltd.*, 81 N.Y.2d 821, 823 (1993)
17 (citation and internal quotation marks omitted). Because
18 the basis for the district court's dismissal was Plaintiffs'
19 failure to establish "the existence of a legally recognized
20 duty of care to the Trust," 816 F. Supp. 2d at 239, there
21 was no need for the district court to independently reach
22 the same conclusion as to the negligence claim, see, e.g.,
23 *Kerusa Co. LLC v. W10Z/515 Real Estate, L.P.*, 810 N.Y.S.2d
24 861, 866 (N.Y. Sup. Ct. 2005).

1 The district court also did not err in dismissing
2 Plaintiffs' NY UCC claims. Under the NY UCC, a bank is
3 strictly liable to refund wire transfers, with interest,
4 where the bank "accepts a payment order issued in the name
5 of its customer as sender which is . . . not authorized and
6 not effective as the order of the customer under Section
7 4-A-202." N.Y. UCC § 4-A-204(1). A bank is also strictly
8 liable for charging against the customer's account a check
9 with an unauthorized signature. N.Y. UCC § 4-401. An order
10 is authorized if the sender "authorized the order or is
11 otherwise bound by it under the law of agency." N.Y. UCC §
12 4-A-202(1).

13 Here, the Trust Account Application and FTA are
14 unambiguous contracts that authorized Signature Bank to
15 process the wire transfers and check at issue. These
16 documents, both signed by all three Trustees, unequivocally
17 identify the authorized individuals to act on behalf of the
18 Trust. There are no provisions that place limitations or
19 conditions on a Trustee's access to or use of the Trust
20 funds. Thus, the Trust authorized Signature Bank to process
21 the four wire transfers and check at issue.

22 We have considered Plaintiffs' remaining arguments and,
23 after a thorough review of the record, find them to be
24 without merit.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk